

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Ken Tschumper,

Complainant,

**ORDER OF DISMISSAL**

vs.

Zenke, Inc., and Travis Zenke,

Respondents.

The above-entitled matter came on for a probable cause hearing before Administrative Law Judge Barbara L. Neilson on October 25, 2012, to consider a campaign complaint filed by Ken Tschumper on October 16, 2012. The probable cause hearing was conducted by telephone conference call. The OAH record closed on October 29, 2012, upon the receipt of post-hearing submissions from the parties.

Karl Sonneman, Attorney at Law, appeared on behalf of the Complainant, Ken Tschumper. Travis Zenke, Chief Executive Officer of Zenke, Inc., appeared without counsel on behalf of the Respondents.

Based on the record and all of the proceedings in this matter, and for the reasons stated in the attached Memorandum, the Administrative Law Judge finds that there is not probable cause to believe that the Respondents violated Minn. Stat. § 211B.15, subd. 2.

**ORDER**

**IT IS HEREBY ORDERED** as follows:

1. There is no probable cause to believe the Respondents violated Minn. Stat. § 211B.15, subd. 2, as alleged in the Complaint.
2. This Complaint, therefore, is **DISMISSED**.

Dated: November 1, 2012

s/Barbara L. Neilson  
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BARBARA L. NEILSON  
Administrative Law Judge

Digitally recorded; no transcript prepared

## NOTICE OF RECONSIDERATION AND APPEAL RIGHTS

Minnesota Statutes § 211B.34, subdivision 3, provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings within two business days after this dismissal. If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the Chief Administrative Law Judge will schedule the complaint for an evidentiary hearing under Minnesota Statutes § 211B.35 within five business days after granting the petition.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 211B.36, subd. 5, and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

## MEMORANDUM

Complainant, Ken Tschumper, is the DFL Party's endorsed candidate for the Minnesota House of Representatives District 28B seat.<sup>1</sup> Greg Davids is the Republican-endorsed candidate for the same seat. Respondent Travis Zenke is the Chief Executive Officer of Zenke, Inc. Respondent Zenke, Inc., is a registered Minnesota corporation.<sup>2</sup>

The Complaint alleges that Travis Zenke and Zenke, Inc. have permitted Mr. Davids and his campaign committee to post campaign signs promoting Mr. Davids' candidacy for House District 28B on property located alongside Highway 16 between La Crescent and Hokah. Photographs of the campaign signs were attached to the Complaint. The Complaint asserts that Zenke, Inc., "owns/leases/rents property used for sand extraction" at the relevant location. The Complaint argues that, by providing Mr. Davids and his committee a prime location for his campaign signs along a major highway in Houston County, the Respondents have violated the prohibition against corporate contributions set forth in Minn. Stat. § 211B.15, subd. 2. By Order dated October 19, 2012, the Administrative Law Judge found that the Complaint set forth a *prima facie* violation of Minn. Stat. § 211B.15 as against Respondents Zenke, Inc. and Travis Zenke.<sup>3</sup>

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<sup>1</sup> House District 28B includes all of Fillmore and Houston Counties.

<sup>2</sup> Business Filing from Secretary of State website attached to Complaint.

<sup>3</sup> The Administrative Law Judge determined that the Complaint failed to set forth *prima facie* violations as against Greg Davids, People for Davids Committee (Mr. Davids' campaign committee), and Joe Sheffers (the treasurer of Mr. Davids' campaign committee), and dismissed those individuals and entities.

A probable cause hearing was held by telephone on October 25, 2012. The Complainant maintained that the signs are placed within 50 to 100 feet of an erosion barrier and a driveway leading to a sand quarry, and alleged that the sand quarry is operated by Zenke, Inc., under a conditional use permit. The Complainant testified during the probable cause hearing that he had spoken to the county assessor prior to filing the Complaint and acknowledged that the assessor was "a little bit uncertain" about the ownership of that property. Mr. Tschumper admitted that the assessor found one summary that showed that Barry and Travis Zenke owned the property. When asked if he had reviewed any information that showed that Zenke, Inc., owned the property, Mr. Tschumper responded, "Not that I can recall."

Travis Zenke argued during the probable cause hearing that no violation of the statute has occurred because Zenke, Inc., does not own or lease the property in question. Mr. Zenke testified that he and his brother, Barry Zenke, are the owners of the property that includes the sand quarry. Mr. Zenke acknowledged that Zenke, Inc., had applied for the conditional use permit to operate the sand borrow pit and remove materials from the site, but maintained that the conditional use permit did not give control of the site to Zenke, Inc., or even apply to the area where the signs are located. He asserted that Zenke, Inc., pays Travis and Barry Zenke \$800 per month as royalties for material obtained from the site, and contended that he and his brother control the other portions of the property used for crops and hunting. He testified that Zenke, Inc., does not have any signs on the property or store equipment there. Moreover, Mr. Zenke testified that the signs were not located within the boundaries of the sand pit itself and possibly were located within the highway right-of-way or on property owned by Croell Ready Mix. He expressed some uncertainty about where the signs were located and indicated that he would have to go and look at the property to be sure.

When asked how the signs came to be placed on the property, Mr. Zenke stated that he did not know who put the signs there and no one contacted him for permission. Mr. Zenke believes someone may have contacted his father. He noted that signs have often been placed on the property in prior years to advertise community events or candidates for election, and he had consented on prior occasions because he did not believe it was any problem.

The parties requested and were afforded the opportunity to submit further information by the end of the day on October 29, 2012. Additional materials were received from both parties. The Complainant provided more pictures of the signs to show where they were situated with respect to the highway, the driveway to the sand pit, and the erosion barrier. He also provided a closing comment in which he indicated that, prior to the issuance of the conditional use permit in approximately 1998, the property was a single farm with a house located slightly to the right of the driveway, a barn located to the left of the driveway, and numerous small buildings scattered around both. He contended that there was also a large pole building, feedlot and fields located on the property in the areas

where asphalt is currently being stored and where excavation is currently being conducted. The Complainant asserted that the entire farm and buildings were considered one entity. The Complainant did not provide any materials supporting any of his statements. He also did not provide a formal legal description of the parcel of land where the signs are located at any time during this proceeding.

In the Respondents' post-hearing submission, Mr. Zenke provided copies of 2012 Property Tax Statements issued to Barry and Travis Zenke for five parcels of land as well as a copy of a 2012 Property Tax Statement issued to Duane, Travis, and Barry Zenke for one parcel of land. In his cover letter, Mr. Zenke stated that, upon review of the pictures of the signs and a site visit, he had determined that the campaign signs in question were not on his personal property at all. He maintained that the signs are approximately 300 feet from his property and are actually located on land used by Croell Ready Mix. He indicated that he has no idea how that land is titled or the specific ownership details of that parcel.

### **Legal Standard**

The purpose of a probable cause hearing is to determine whether there are sufficient facts in the record to believe that a violation of law has occurred as alleged in the complaint.<sup>4</sup> The Office of Administrative Hearings looks to the standards governing probable cause determinations under Minn. R. Crim. P. 11.03 and by the Minnesota Supreme Court in *State v. Florence*.<sup>5</sup> The purpose of a probable cause determination is to determine whether, given the facts disclosed in the record, it is fair and reasonable to require the respondent to address the claims in the Complaint at a hearing on the merits.<sup>6</sup>

In his complaint, the Complainant alleged that the Respondents have violated Minnesota Statutes § 211B.15, subd. 2, which pertains to prohibited corporate contributions. That portion of the statute specifies:

A corporation may not make a contribution or offer or agree to make a contribution; directly or indirectly, of any money, property, free service of its officers, employees, or members, or thing of monetary value to a major political party, organization, committee, or individual to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office. For the purpose of this subdivision, "contribution" includes an expenditure to promote or defeat the election or nomination of a candidate to a political office that is made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the

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<sup>4</sup> Minn. Stat. § 211B.34, subd. 2.

<sup>5</sup> 239 N.W.2d 892 (Minn. 1976); see also Black's Law Dictionary 1219 (7<sup>th</sup> ed. 1999) (defining "probable cause" as "[a] reasonable ground to suspect that a person has committed or is committing a crime.")

<sup>6</sup> *State v. Florence*, 239 N.W.2d at 902.

request or suggestion of, a candidate or committee established to support or oppose a candidate but does not include an independent expenditure authorized by subdivision 3.<sup>7</sup>

In a past case brought under the Fair Campaign Practices Act, a panel of three Administrative Law Judges found that it is a violation of the prohibition against corporate contributions contained in Minn. Stat. § 211B.15 for a corporation to post a campaign sign on its corporate property promoting the candidacy of an individual running for the State Legislature.<sup>8</sup>

### **Analysis**

The Complainant argues that the campaign signs at issue here were posted on property that is “controlled” by Zenke, Inc., an excavation company that is permitted to operate a borrow pit on the property under the terms of a conditional use permit, and asserts that Zenke, Inc., thereby made a prohibited corporate contribution to Mr. Davids’ campaign. The Complainant has not provided any evidence of the exact location of the campaign signs or any material demonstrating that Zenke, Inc., owns the title to the property where the signs were located or even that Zenke, Inc., has leased that property. In fact, the Complainant conceded during the probable cause hearing that the county assessor informed him that Barry and Travis Zenke owned property somewhere in that vicinity, and admitted that he cannot recall seeing *any* information suggesting that Zenke, Inc., owns the property. Although the Complainant was afforded an opportunity to provide further information following the probable cause hearing, he did not provide documentary support for his claim. In contrast, the Respondents presented testimony and evidence both during and after the probable cause hearing strongly supporting their argument that Zenke, Inc., does not own the property at issue or control anything other than its operations while using the borrow pit. The Respondents also suggested that the signs are not even located on property owned by Travis and Barry Zenke.

In an analogous case arising under Minn. Stat. § 211B.15, Presiding Administrative Law Judge Richard Luis found no probable cause to believe that a corporation that merely managed but did not own three commercial properties where campaign signs were posted had violated the statutory prohibition against corporate contributions.<sup>9</sup> Judge Luis emphasized in that case that the corporation “does not own the properties, and [the complainant] has not

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<sup>7</sup> Minn. Stat. § 211B.15, subd. 2. Minn. Stat. §§ 211B.15, subd. 3, and 10A.01, subd. 18, define “independent expenditure” to mean an expenditure “expressly advocating the election or defeat of a clearly identified candidate, if the expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate’s principal campaign committee or agent. . . .”

<sup>8</sup> *Lorrie Adams v. Rep. Bruce Anderson and Klatt True Value Hardware Electric Co.*, OAH Docket No. 12-0320-19974-CV (Nov. 19, 2008).

<sup>9</sup> *Moses v. Roseville Properties Management Company, d/b/a Roseville Properties and/or 801 Transfer Road LLC*, OAH Docket No. 7-6361-16924-CV (Oct. 27, 2005). In that case, the properties where the signs were located were owned by general partnerships, and the Administrative Law Judge concluded that the prohibition set forth in Section 211B.15 did not apply to partnerships.

presented any evidence to support his claim that the corporation controls the properties.” He dismissed the complaint.<sup>10</sup>

After reviewing the Complaint, its attachments, and the additional evidence and argument offered by the parties at the probable cause hearing and in their later submissions, the Administrative Law Judge concludes that the Complainant has failed to establish probable cause to believe that the Respondents violated Minn. Stat. § 211B.15 as alleged in the Complaint. There is insufficient evidence to suggest that Zenke, Inc., contributed something of monetary value to candidate Greg Davids by allowing Mr. Davids to post campaign signs on corporate property. The Complaint is therefore dismissed in its entirety.

**B. L. N.**

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<sup>10</sup> *Id.* at 3.